IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

WRIT PETITION NO.5110 OF 2004

Chandrakant Atmaram Joshi and another).. Petitioners

Versus

Raju Kochar and others).. Respondents

Mrs.S.A.Mudbidri for the Petitioners.

Mr.J.A.Udaipuri for Respondent Nos.1 to 8.

Mr.A.J.Joshi for Respondent Nos.9 and 10.

CORAM: SMT.NISHITA MHATRE, J.

DATED: 2ND SEPTEMBER 2004

P.C.:

. This Petition challenges the order dated 19th April 2004 passed by the Joint Civil Judge, Junior Division, Palghar below Exhibit 47 in Regular Civil Suit No.12 of 2004 disallowing the application filed by the Petitioners for appointment of Taluka Inspector of Land Records (TILR) as Court Commissioner to inspect and state whether there is any encroachment of the property in which the Petitioners claim to be tenants.

2. The claim of the Petitioners is that they are tenants of the suit property bearing Survey No.139 and Survey Nos.140-1 and 140-2 in the Village Saravali,

Taluka Palghar, District Thane. According to the Petitioners, although their tenancy application has been dismissed and the appeal therefrom has also been dismissed, Writ Petition filed by them being Writ Petition No. 1826 of 1996 has been admitted and interim reliefs have been refused. The Petitioners claim that the Respondents have started obstructing Petitioners' possession and, therefore, they have filed a Suit being Suit No.12 of 2004. The prayers in the Suit, inter alia, were for injunction as also for removal of the encroachment caused on the said suit lands by the Respondents. It appears that after the Writ Petition was admitted, there is a sale of the suit lands by Respondent Nos.2 to 10 to Respondent No.1. The Petitioners claim that Respondent No.1 is encroaching on the suit lands and, therefore, it was necessary to appoint a Court Commissioner to check the boundary and to ascertain whether the Respondents are in fact encroaching upon the suit lands. This application has been negatived by the Joint Civil Judge, Junior Division, Palghar by the impugned order.

3. Mrs.Mudbidri for the Petitioners submits that despite the pendency of the Writ Petition, sale of the suit lands has taken place. Thus, after the sale of the suit lands, encroachment from Respondent No.1 has taken place on the suit lands. She submits that this

encroachment prejudically affects the rights of the Petitioners and, therefore, it is only to ascertain whether there is in fact an encroachment on the suit lands that Court Commissioner is required to be appointed.

4. Mr.Udaipuri for Respondent Nos.1 to 8 vehemently opposes the application for appointment of Court Commissioner. He submits that the appointment of the Court Commissioner cannot be made in the facts and circumstances of the case. According to him, the Petitioners have failed to establish their rights as tenants in every round of litigation. Moreover, he submits that the Petitioners are not in possession of the suit lands as held in various proceedings. In these circumstances, according to the learned Advocate, there is no necessary to appoint Court Commissioner. Furthermore, he submits by relying on the judgment in the case of *Sanjay Namdeo Khandare* vs. *Sabhebrao Kachru Khandare and others*, **2001 (2) Mh.L.J. 959**, that the provisions of Order 26, Rule 9 of the Civil Procedure Code for appointment of Court Commissioner cannot be invoked in order to collect evidence regarding possession. He further submits that once prayer for temporary injunction has been refused by the lower Court, there is no need for Court Commissioner to be appointed.

5. Mr.Joshi for Respondent Nos.9 to 10 supports the submission of the learned Advocate for Respondent Nos.1 to 8.

6. The prayers in the plaint indicate that the Suit has been filed not only for injunction but also for a relief that encroachers in the tenanted premises i.e. suit lands should be removed. The Petitioners claim that the Respondents are encroaching on the land bearing Survey No.139. The Petitioners claim to be tenants of this land. According to the Respondents, the development and construction is being carried out by them on the land bearing Survey No.187/3. In such circumstances, I do not see any reason why Court Commissioner cannot be appointed for ascertaining whether in fact there is any encroachment on the suit lands. There is no prejudice which is going to be caused to the Respondents if the Court Commissioner is appointed.

7. In view of this, the impugned order dated 19th April 2004 passed by the Joint Civil Judge, Junior Division, Palghar passed in Regular Civil Suit No.12 of 2004 is set aside. Writ Petition allowed in terms of prayer clause (b).

8. Office to provide authenticated copy of this order.